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No. 82-227

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROVIDENCE JOURNAL COMPANY, PETITIONER

v.

HOME PLACEMENT SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the First Amendment allows a newspaper publisher to engage in conduct that would be illegal under the Sherman Act if carried out by other businesses.

2. Whether the court below erred in concluding that petitioner did not have a reasonable business justification for its actions.

3. Whether the court below failed to comply with Fed. R. Civ. P. 52.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 682 F.2d 274. The district court's opinion (Pet. App. A14-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1982. The petition for a writ of certiorari was filed August 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First Amendment to the Constitution and Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2) are set forth at Pet. 2-3.

STATEMENT

1. This case is the second private antitrust action involving the refusal of petitioner, Providence Journal Company, to accept classified advertisements from rental referral services. The rental referral agency in the first litigation, Homefinders of America, Inc., ran brief, untraceable classified ads, often for nonexistent properties (Pet. App. A2). When a rental prospect called the telephone number listed in the ad, he was told that the property was no longer available, but that, for a fee of $20, other listings would be made available (*id.* at A56). The ads for the nonexistent properties were enticing, often representing, for example, that pets or children were welcome, that parking was available, or that the cost of utilities was included in the rent (*ibid.*). Homefinders often included properties on its lists without consent of the property owners (*ibid.*). Providence Journal received a large number of complaints about these practices, and ultimately refused to accept any more of Homefinders' advertisements (*id.* at A3, A37). Homefinders' operator thereupon sued petitioner under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2), seeking, *inter alia*, damages and injunctive relief (Pet. App. A37).

The district court entered judgment in petitioner's favor (*Homefinder's of America, Inc.* v. *Providence Journal Co.*, 471 F. Supp. 416, 422-423 (D.R.I. 1979) (Pet. App. A36-A53)), and the First Circuit affirmed (621 F.2d 441 (1980) (Pet. App. A54-A61)). The court of appeals held that even if petitioner had a monopolistic position, the Sherman Act "is not aimed at reasonable conduct," and petitioner's refusal

of advertising "that offends its readers and could turn them away" is "not unreasonable" (Pet. App. A58).

2. In the present case, unlike the Homefinders litigation, respondent Home Placement Service, Inc., advertised properties that were actually available, and petitioner did not receive any complaints during the short period that it carried respondent's advertisements (Pet. App. A2-A3). Respondent's referral business was similar to that of Homefinders', however, in that respondent was selling a listing of rental properties and would promote this list to persons responding to its advertising (*ibid.*). Landlords could advertise free of charge in respondent's publication, and respondent derived its revenues from the sale of lists to prospective renters (*id.* at A2, A6).

As a result of its difficulties with the plaintiff in the first case, the petitioner adopted a policy, which it printed daily in its paper, that it would not accept "advertising where a fee is required to obtain rental information" (Pet. App. A3). Respondent advertised in petitioner's newspaper for about two weeks before respondent's president was told that its advertising would no longer be accepted (*id.* at A8, A16). Respondent then promised not to assess a fee in connection with the properties it advertised in the Providence Journal, and the newspaper agreed to run the ads again (*ibid.*). Respondent went out of the rental referral business shortly afterward (Pet. 8-9).

3. Respondent brought an action against petitioner in the United States District Court for the District of Rhode Island charging petitioner with violating Sections 1 and 2 of the Sherman Act (Pet. App. A14). The district court ruled for the petitioner. As to the Section 2 claim, based on monopolization, it held that respondent had not shown the existence of monopoly power because it failed to define the relevant market (Pet. App. A17). The district court further concluded that petitioner's refusal to deal was a reasonable

business decision because the Homefinders and Home Placement schemes were "indistinguishable" (*id.* at A18). As to the Section 1 claim, based on conspiracy in unreasonable restraint of trade, the district court held that the petitioner's refusal to deal was unilateral and there was accordingly no conspiracy or combination (*id.* at A19).

The court of appeals reversed (Pet. App. A1-A13). It held that the district court's finding that the present advertising scheme was "indistinguishable" from the earlier scheme was "clearly erroneous" (*id.* at A2). The court of appeals noted that there were no complaints about respondent's business practices, nor was there any showing that the advertised descriptions were false or misleading (*id.* at A2-A4). The court of appeals decided that it could not "accept that the sale of rental information is an inherently and unfailingly deceptive practice," and it therefore concluded that there was no valid business reason for rejecting ads for rental referral agencies simply on the ground that the agencies charged a fee (*id.* at A4-A5).

The court of appeals noted that a newspaper is presumptively free to choose its advertising, but added that this freedom may be limited in special circumstances, such as when the newspaper is dealing with its competitors (Pet. App. A5-A6). The court disagreed with the district court's finding that the newspaper's policy here did nothing "other than reduce its advertising revenues" (*id.* at A6-A7). The court of appeals concluded that there was extensive record evidence that rental referral businesses are in direct competition with newspapers selling more traditional forms of rental advertising. Since the respondent's services are free to landlords, respondent "could siphon off lessors by saving them the cost of [petitioner's] columns" (*id.* at A7). Further, market data introduced in the district court demonstrated that the classified section of the largest metropolitan newspaper in the area is "the essential medium for [the] survival"

of rental referral services (*ibid.*). Thus, rather than simply reducing the Providence Journal's present revenues, petitioner's refusal to deal with respondent actually protected its future advertising revenues (*ibid.*).

The court of appeals found violations of both Section 1 and Section 2 of the Sherman Act. It determined, with respect to the Section 1 conspiracy complaint, that the newspaper's action was not unilateral. The newspaper went beyond simply refusing to publish respondent's ads — the paper agreed to resume publication if the respondent agreed to its terms. This amounted to a combination "which, in effect, fixed a maximum price of zero on respondent's sale of rental information" (Pet. App. A8). The court noted that an unlawful combination is not avoided simply because one of the parties to the agreement is an unwilling participant, and it concluded that the combination in this case could not be upheld as reasonable because "it served no legitimate business purpose" and tended to destroy competition (*id.* at A8-A9).

As for the Section 2 monopolization claim, the court of appeals held that the newspaper was using its dominance in one market (the newspaper rental advertising market) to foreclose competition in another (the housing vacancy information market) (Pet. App. A9). The court of appeals concluded that "with respect to the sale of rental advertising within the City Zone [petitioner] was a monopolist" (*id.* at A11-A12).[1] Further, petitioner's refusal to run respondent's ads "put [respondent] out of the rental referral business,"

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[1]The court found that petitioner offered "no rebuttal of [respondent's] substantial evidence" that there was no effective substitute for daily newspaper rental advertising available to it (Pet. App. A10). Further, there were no daily papers "effectively competing" for advertisement of property located within the central city zone. Within that zone, petitioner "had an uncontested lock on the sale of rental listings" (*id.* at A11).

thereby removing a potential competitor in the listing of rental information (*id.* at A12). Although this would be permissible if the monopolist had "a legitimate business reason," that reason was lacking here (*ibid.*).[2]

DISCUSSION

The decision below does not conflict with the decisions of any other circuit and is in accord with the decisions of this Court. Further, petitioner's disagreements with the court below turn in part on the proper characterization of the facts of this case under accepted principles of law. In these circumstances, the case does not present questions meriting review by this Court.

1. Relying on the First Amendment, petitioner asserts that a newspaper "operates within a larger zone of reasonableness" than other businesses, particularly where decisions regarding acceptance of advertising are involved.[3] Pet. 17; see also Pet. 15. Newspapers, however, have no special immunity from the application of general laws. *Branzburg* v. *Hayes*, 408 U.S. 665, 682-683 (1972). See also, *e.g.*, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192 (1946) (Fair Labor Standards Act); *Associated Press* v. *NLRB*, 301 U.S. 103, 132-133 (1937) (National Labor Relations Act). Nor are their commercial dealings exempt from the Sherman Act.[4] Indeed, this Court has stated that:

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[2]The court of appeals remanded the case for determination of the appropriate relief (Pet. App. A13).

[3]Petitioner raised this First Amendment issue in its brief in the court of appeals only in a footnote. The court of appeals, accordingly, did not address the issue in its opinion, and this Court therefore does not have the benefit of its views.

[4]There is no express exemption from the Sherman Act for newspapers. Implied exemptions from the antitrust law are not favored. See, *e.g.*, *Union Labor Life Ins. Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip op. 5-6; *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981); *Abbott Laboratories* v. *Portland Retail Druggists Association*, 425 U.S. 1, 11-12 (1976).

> [t]he First Amendment, far from providing an argument against application of the Sherman Act, * * * provides powerful reasons to the contrary. * * * Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Associated Press v. *United States*, 326 U.S. 1, 20 (1945). See also, *e.g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 800 n.18 (1978) ("application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment"); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969) (agreement between newspapers to fix prices, pool profits, and divide markets is not protected by First Amendment); *Lorain Journal* v. *United States*, 342 U.S. 143 (1951) (attempted monopolization by newspaper though selective refusal of advertising is subject to Sherman Act); *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934) (plaintiff alleged a conspiracy to monopolize portion of farm paper business through manipulation of advertising rates).[5]

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[5]Petitioner relies (Pet. 20) on *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), to argue that the Sherman Act does not regulate newspapers unless their First Amendment activities are a "sham." *Noerr*, however, dealt with the special problems raised by the First Amendment right to petition the government. That right, in many instances, cannot be effectively exercised except through concerted action. 365 U.S. at 136. In *Noerr*, this Court determined that Congress could not have intended the Sherman Act to interfere with the right to petition, when it is legitimately exercised by competitors acting in concert. 365 U.S. at 137-138. In contrast to *Noerr*, petitioner's activities at issue in this case do not involve petitioning the government. Consequently, the rationale of *Noerr* has no application to this case. The First Amendment's guarantee of freedom of the press

This Court has repeatedly rejected suggestions, such as petitioner makes here, that the Sherman Act should apply only in some diluted form to newspapers. In *Associated Press* v. *United States, supra,* 326 U.S. at 6, the argument was made "that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act." This Court, however, concluded (326 U.S. at 7) that publishers:

> are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. * * * All are alike covered by the Sherman Act. The fact that the publisher handles news while the others handle food does not * * * afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.

Similarly, in *Lorain Journal* v. *United States, supra,* 342 U.S. at 155-156, this Court held that publishers are not immune from injunctions against attempted monopolization: "The injunction applies to a publisher what the law applies to others. * * * Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others."

Petitioner characterizes its decision to refuse respondent's ads as "editorial" (Pet. i, 12, 19, 20), and thereby attempts to have this decision treated in the same manner as decisions about what news or opinion to publish. While this

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does not require anticompetitive concerted action for its full realization. To the contrary, this Court held in *Associated Press* v. *United States, supra,* 326 U.S. at 19-20, that First Amendment values are actually promoted by application of the Sherman Act to anticompetitive activities by the press.

Court has suggested that the Sherman Act does not dictate what news a newspaper must publish (see *Associated Press* v. *United States, supra,* 326 U.S. at 20 n.18), advertising is commercial speech, not news. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388 (1973). Commercial speech can be banned if related to illegal activity (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 563-564 (1980)), and can be regulated in furtherance of important government interests, such as those represented by the antitrust laws (447 U.S. at 564; *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 456-459 (1978)). Here petitioner's decision to reject advertising was an integral part of alleged anticompetitive activity; it can therefore be regulated under the Sherman Act. See *Central Hudson Gas & Electric Corp.* v. *Public Service Commission, supra,* 447 U.S. at 564.

In sum, this Court consistently has refused to fashion an antitrust exemption for the newspaper industry's commercial dealings, including advertising decisions. There is no reason to reconsider that established precedent in this case.

2. Petitioner also argues (Pet. 21-26) that the court of appeals erred in determining that petitioner acted unreasonably in refusing to accept respondent's advertising. Petitioner contends that a monopolist[6] is not liable under the Sherman Act for actions that harm its competitors so long as those actions are reasonable business decisions. It argues (Pet. 24-26) that it could reasonably ban all advertisements for businesses charging a fee for rental information because

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[6]Petitioner does not challenge the market definitions used by the court of appeals in determining that petitioner was a monopolist in the city zone market for daily newspapers carrying real estate rental information. Petitioner, moreover, concedes the "hypothetical possibility" of competition between itself and respondent in that market (Pet. 21). We therefore express no views on these issues.

such businesses mislead the public and bring a newspaper into disrepute. Petitioner's arguments on this point, however, are based on a factual disagreement with the court of appeals rather than on a dispute regarding applicable law.

There is no disagreement between petitioner and the court of appeals with respect to legal theory. The court did not hold that a firm with monopoly power could not engage in normal profit maximizing conduct — such as providing superior products or cutting prices — even if its competitors were hurt by such conduct. Indeed, the court agreed that a monopolist must have considerable freedom to make business decisions, as the court's earlier decision in the *Homefinders* case makes clear (Pet. App. A6). Petitioner's disagreement, therefore, is with the court of appeals' finding that petitioner's refusal to accept rental information advertising was an overly broad reaction to a business problem (*id.* at A4).[7]

The correctness of the court of appeals' factual conclusion that petitioner's refusal to deal was unreasonable is not a legal issue of general or recurring importance. On the basis of its factual finding of overly restrictive conduct by a firm with monopoly power, the court of appeals found that petitioner had used its monopoly power unreasonably. Under existing law, such conduct violates Section 2 of the Sherman Act (see, *e.g.*, *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1389-1390 (5th Cir.), cert. denied, 449 U.S. 912 (1980); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488 (1st

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[7]Petitioner claims (Pet. 22-23) that the decision below conflicts with the Fifth Circuit's decision in *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, cert. denied, 449 U.S. 912 (1980). The two courts of appeals, however, agree that a reasonable business decision by a monopolist that hurts a competitor does not necessarily amount to a Sherman Act violation, and there is no indication that the Fifth Circuit would have reached a different result here.

Cir.), cert. denied, 344 U.S. 817 (1952); cf *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377-378 (1973)), and there is no need for this Court to review the application of existing legal principles in the special factual setting of this case.[8]

Contrary to petitioner's suggestion (see, e.g., Pet. 19), the decision below is narrowly drafted and will not prevent newspapers from refusing misleading ads, ads that spawn complaints, or ads that affect the newspaper's good will. Nothing in the decision below, moreover, requires the

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[8]In concluding that petitioner had violated Section 2, the court of appeals noted (Pet. App. A12), relying on *United States* v. *Griffith*, 334 U.S. 100, 105 (1948), that petitioner had used its monopoly power in one market to suppress competition in a separate market. Although the court may have reached the correct conclusion, its analysis, to the extent that it relied on *Griffith*, focused on the wrong question. In this case, the Providence Journal's monopoly position gave it control over whether there would be any market in Home Placement's type of rental referral service; it could block competition from Home Placement or any similar service simply by withholding advertising space. Such action does not necessarily violate the antitrust laws, as the court's prior decision in *Homefinders* made clear. The relevant question in this case, therefore, is whether there is sufficient economic justification for petitioner's blanket policy against accepting any advertising from rental referral agencies. This is also the fundamental issue implicit in tie-in cases, although the theory of restraint is generally based in such cases —as it is in this case — upon relatively imprecise notions of "leverage" or extension of market power from one market to another. As the First Circuit's reliance on *Griffith* illustrates, such theories can be misleading where the economic phenomenon being analyzed is not the transfer of market power, but a business decision that determines the precise form that competition will take (competition for sale of one product, or competition for each of the separate elements that comprise that product). Cf. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 556-558 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) (corporate decision to block development of new market in servicing of corporation's manufactured equipment held to be reasonable). The court of appeals' conclusion that petitioner acted without adequate justification appears correct and, in any event, does not raise any issue warranting review by this Court.

newspaper to deal with advertisers individually (see Pet. 13, 25); rather, the court of appeals' decision simply requires a monopoly newspaper to exercise care in defining categories of unacceptable advertising when the affected advertisers are competitors or potential competitors of the newspaper. The court of appeals' finding that petitioner's rental referral policy was an overly restrictive business decision is not clearly wrong, and accordingly does not warrant review by certiorari.[9]

3. Petitioner complains (Pet. 26-29) that the court of appeals set aside the district court's finding that petitioner acted reasonably without making the necessary ruling that the district court's finding of fact was clearly erroneous. The court of appeals, however, did find "clearly erroneous" the district court's conclusion that the Homefinders and Home Placement schemes were indistinguishable (Pet. App. A2). The court of appeals further stated that "[w]e cannot accept that the sale of rental information is an inherently or unfailingly deceptive practice, or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium" (Pet. App. A5). These statements, read together with the remainder of the opinion, can reasonably be interpreted as a holding that the district court's finding of reasonableness was clearly erroneous. Accordingly, the court of appeals fully complied with Fed. R. Civ. P. 52.

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[9]In ruling against petitioner, the court of appeals also held that petitioner had violated Section 1 of the Sherman Act. The court based this conclusion on its belief that the petitioner had conspired to "fix[] a maximum price of zero" (Pet. App. A8) on Home Placement's services. This is a dubious ground for finding a Section 1 violation; the court appears to have incorrectly confused price fixing with refusals to deal that, depending on their effect and purpose, may or may not violate the antitrust laws. Nevertheless, there is no reason to review the court's Section 1 analysis, since its reasoning concerning the Section 2 claim (monopolization) is sufficient to sustain the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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